

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Instapage Network, Ltd.	)	File No. 0000175254
	)	
Notification of Construction and Request for	)	
Waiver of Narrowband PCS Station KNKV222	)	

**ORDER ON RECONSIDERATION**

**Adopted: October 3, 2002**

**Released: October 4, 2002**

By the Chief, Wireless Telecommunications Bureau:

**I. INTRODUCTION**

1. In this Order, we address a Petition for Reconsideration filed on August 20, 2001 by Instapage Network, Ltd. (“Instapage”) seeking reconsideration of an order dismissing Instapage’s five-year construction notification as defective and denying its request for waiver with respect to narrowband Personal Communications Service (“PCS”) license KNKV222.<sup>1</sup> Instapage asks that the *Order* be rescinded and its license for station KNKV222 be reinstated *nunc pro tunc*. In addition, we address the Request for Partial Stay (“Stay Request”) filed by Instapage on August, 15, 2001, seeking partial stay of two conditions imposed on the Special Temporary Authority (“STA”) granted to Instapage in the *Order*, pending consideration of its Reconsideration Petition.<sup>2</sup> We also address a Petition for Reconsideration filed on August 27, 2001, by Instapage seeking reconsideration of an order dismissing as moot Instapage’s June 27, 1999 request for a grace period pursuant to the Commission’s then applicable installment payment rules.<sup>3</sup> For the reasons stated below, we deny both petitions for reconsideration and affirm both Orders. Further, because we deny Instapage’s Reconsideration Petition and because the STA expired on January 16, 2002, we dismiss Instapage’s Stay Request as moot.

<sup>1</sup> Petition for Reconsideration filed by Instapage Network, Ltd. on August 20, 2001 (“Reconsideration Petition”); *see also* In the Matter of Instapage Network, Ltd., Notification of Construction and Request for Waiver of Narrowband PCS Station KNKV222, *Order*, 16 FCC Rcd 14029 (WTB, CWD 2001) (“*Order*”).

<sup>2</sup> In the Matter of Instapage Network, Ltd. Notification of Construction and Request for Waiver of Narrowband PCS Station KNKV222, Request for Partial Stay, filed August 15, 2001 (“Stay Request”).

<sup>3</sup> Petition for Reconsideration filed by Instapage Network, Ltd. on August 27, 2001 (“Grace Period Reconsideration Petition”); *see also* Letter to Mr. Thomas Gutierrez, Esq., Counsel for Instapage Network Ltd., from Margaret M. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, 16 FCC Rcd. 14,728 (WTB, AIAD 2001) (“*Grace Period Dismissal Order*”); Letter from Thomas Gutierrez, Lukas, Nace, Gutierrez & Sachs, to Ms. Kathleen O’Brien-Ham, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, dated June 27, 1997 (“Grace Period Request”).

## II. BACKGROUND

2. On January 23, 1995, the Commission granted Instapage, through its predecessor, a narrowband PCS license for Region 2 (South Region) on channel block 16.<sup>4</sup> In accordance with section 24.103 of the Commission's rules, Instapage was required to meet its five-year coverage requirement no later than January 23, 2000.<sup>5</sup> Specifically, as of that date, section 24.103(b) required Instapage either to provide coverage to a composite area of 150,000 square kilometers or to serve 37.5 percent of the population of its licensed area.<sup>6</sup> Furthermore, sections 1.913(b) and 1.946(d) of the Commission's rules required Instapage to file an electronic notification of construction no later than February 7, 2000, certifying compliance with the five-year coverage requirement.<sup>7</sup> In the alternative, section 1.946(e) provides that a licensee may request an extension of time to meet a construction requirement; however, the extension request must be filed on or before the construction deadline, *i.e.*, no later than January 23, 2000.<sup>8</sup> Pursuant to section 1.946(c) of the Commission's rules, if a licensee fails to satisfy its construction requirement in a timely manner, its license terminates automatically as of the construction deadline, absent grant of an extension of time or other waiver.

3. Instapage filed its five-year construction notification on June 22, 2000, four and a half months after the filing deadline.<sup>9</sup> In its notification, Instapage claimed that it had met the construction requirement of section 24.103 and that it was providing a level of service to the market that constituted "substantial service."<sup>10</sup> In the event that the Commission did not accept its construction notification, however, Instapage requested a waiver of sections 1.946 and 24.103 "with respect to timing issues."<sup>11</sup> Because requests for an extension must be filed on or before the licensee's construction deadline, this request for relief was five months overdue. On July 13, 2000, the Commercial Wireless Division ("Division") of the Bureau requested clarification of Instapage's claim that it had met the coverage requirements of section 24.103.<sup>12</sup> In its August 21, 2000 reply, Instapage stated that "[b]ased on the strict numerical coverage requirements that were in place as of [its five-year construction deadline], Instapage did not provide coverage to 37.5 percent of the population within its service area or provide coverage to a composite area of 150,000 square kilometers."<sup>13</sup> Although Instapage did not provide exact figures of its

<sup>4</sup> Insta-Check Systems was the winning bidder for the license in Market R002-05. On February 14, 1997, the Wireless Telecommunications Bureau ("Bureau") approved the transfer and assignment of the Channel 16 southern regional license from Insta-Check Systems to Instapage. See Wireless Telecommunications Bureau Commercial Wireless Service Information, Report No. LB-97-19, *Public Notice* (rel. Feb. 14, 1997). Region 2 (South Region) consists of ten Major Trading Areas, Puerto Rico, and the United States Virgin Islands. See 47 C.F.R. § 24.102(b)(2). As a small business, Instapage was eligible to pay the remainder of its winning bid, after down payments, with installment payments. See 47 C.F.R. §§ 1.2110(g), 24.309(b)(1).

<sup>5</sup> 47 C.F.R. § 24.103.

<sup>6</sup> *Id.*

<sup>7</sup> 47 C.F.R. §§ 1.913(b), 1.946(d).

<sup>8</sup> 47 C.F.R. § 1.946(e).

<sup>9</sup> See Letter from Thomas Gutierrez, Esq., counsel for Instapage Network, Ltd. to William W. Kunze, Deputy Chief, Commercial Wireless Division, Wireless Telecommunications Bureau, dated June 22, 2000 ("Construction Notification/Waiver Request").

<sup>10</sup> Construction Notification/Waiver Request at 3-4.

<sup>11</sup> *Id.* at 1, Appendix I.

<sup>12</sup> See Letter from Paul D'Ari, Chief, Policy and Rules Branch, Commercial Wireless Division, Wireless Telecommunications Bureau, to Thomas Gutierrez, Esq., dated July 13, 2000.

<sup>13</sup> See Letter from Thomas Gutierrez, Esq., to Paul D'Ari, Chief, Policy and Rules Branch, Commercial Wireless Division, Wireless Telecommunications Bureau, dated August 21, 2000.

coverage as of the construction deadline, it did indicate that, as of that date, it was providing coverage only to the San Juan, Puerto Rico area. At most, the greater San Juan, Puerto Rico area only includes approximately 4.2 percent of the population or 5,097 square kilometers of Region 2.<sup>14</sup>

4. On July 20, 2001, the Division dismissed Instapage's construction notification as defective and denied its request for waiver. The Division found that Instapage's construction notification was untimely filed and that, by its own admission, Instapage had failed to satisfy the minimum five-year coverage benchmarks in effect for narrowband PCS licensees.<sup>15</sup> The rules in effect on that date did not permit Instapage to make a showing of substantial service as an alternative to the geographic or population coverage benchmarks.<sup>16</sup> In addition, the Division found that Instapage's waiver request was untimely filed because Instapage should have requested a waiver or extension of time on or before its construction deadline, pursuant to section 1.946(e). The Division denied Instapage's request for waiver of the filing deadlines, stating that Instapage failed to provide any justification for its inability to file a construction notification as of February 7, 2000, or to request an extension on or before the construction deadline of January 23, 2000.<sup>17</sup> Instapage's license for station KNKV222 therefore terminated automatically on January 23, 2000, in accordance with sections 1.946(c) and 1.955(a)(2). The Division, on its own motion, granted Instapage STA to continue its current operations, subject to certain conditions, pending the transition of its subscribers to licensed carriers.<sup>18</sup> Instapage's STA subsequently expired on January 16, 2002, and Instapage did not seek renewal of the STA.

5. On July 26, 2001, the Auctions and Industry Analysis Division ("A&IAD") dismissed a pending grace period request filed by Instapage.<sup>19</sup> Under the former grace period rule, a licensee was permitted to request a three to six month period during which no installment payments needed to be made. 47 C.F.R. § 1.2110(e)(4)(ii)(1997). In the *Grace Period Dismissal Order*, A&IAD found that although Instapage's grace period request was timely filed,<sup>20</sup> in light of the automatic termination of the license, Instapage's license term had ended and Instapage was no longer eligible to pay the outstanding amount of its winning bid obligation with installment payments.<sup>21</sup> Accordingly, A&IAD dismissed the grace period request as moot.<sup>22</sup>

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<sup>14</sup> This estimate was calculated using the population and square kilometers of the Basic Trading Area of San Juan, Puerto Rico (BTA488), which is one component of Region 2 (South Region).

<sup>15</sup> *Order* at 14030, para. 4.

<sup>16</sup> *Id.* at 14029, n. 5.

<sup>17</sup> *Id.* at 14031, para. 6. The Order also explained that, because Instapage's license had terminated automatically on January 23, 2000, Instapage had sought relief from the Commission's rules several months after its license had terminated. *Id.*

<sup>18</sup> See Instapage STA WZZN222, granted July 20, 2001, expired January 16, 2002.

<sup>19</sup> *Grace Period Dismissal Order*, 16 FCC Rcd. 14,728.

<sup>20</sup> Although the Commission in the *Part 1 Third Report and Order* modified the installment payment grace period and late payment fee provisions of its rules, it determined that late payment and automatic cancellation provisions of amended Section 1.2110 would not apply to licensees with properly filed grace period requests until the Bureau addressed the grace period requests. See Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, 4660-4685 MHz, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 434-42, paras. 103-113 (1997) ("*Part 1 Third Report and Order*").

<sup>21</sup> *Grace Period Dismissal Order*, 16 FCC Rcd. 14,728 (citing 47 C.F.R. §§ 24.321(d); 1.2110(g)).

<sup>22</sup> *Id.*

6. On August 20, 2001, Instapage filed a petition, seeking reconsideration of the Division's Order and asking that its license for station KNKV222 be reinstated *nunc pro tunc*.<sup>23</sup> In addition, on August 15, 2001, Instapage filed a request for partial stay of the *Order* pending a determination on its Reconsideration Petition.<sup>24</sup> Specifically, Instapage requested a stay of two of the *Order's* STA conditions. First, Instapage requested a stay of the condition requiring Instapage to provide notice to all subscribers within 30 days of the Order that (1) its license had been terminated, (2) it was operating under temporary authority, and (3) it would provide at least 30 days prior notice of final discontinuation of operation. Second, Instapage requested a stay of the condition prohibiting Instapage from soliciting or adding new subscribers in its region while operating under STA. On August 21, 2001, the Division granted Instapage a temporary, oral stay of these STA conditions pending consideration of its Reconsideration Petition.

7. On August 27, 2001, Instapage filed a petition, seeking reconsideration of A&IAD's July 26, 2001 Order dismissing as moot Instapage's June 27, 1999 request for a grace period pursuant to the Commission's then applicable installment payment rules.<sup>25</sup>

### III. DISCUSSION

8. Pursuant to sections 1.946(c) and 1.955(a)(2) of the Commission's rules, a narrowband PCS license will terminate automatically as of the construction deadline if the licensee fails to satisfy its construction requirements, unless the Commission grants an extension request or waives the narrowband PCS construction requirements.<sup>26</sup> An extension of time to complete construction may be granted, pursuant to sections 1.946(e), if the licensee shows that the failure to complete construction is due to causes beyond its control.<sup>27</sup> Waiver may be granted, pursuant to section 1.925 of the Commission's rules, if the petitioner establishes either that: (1) the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and that grant of the waiver would be in the public interest; or (2) where the petitioner establishes unique or unusual factual circumstances, application of the rule would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.<sup>28</sup> In its *Order*, the Division found that Instapage failed to satisfy the minimum coverage benchmarks and, furthermore, failed to warrant a waiver of the applicable filing deadlines. Accordingly, Instapage's license terminated automatically on January 23, 2000. As discussed below, we find no reason to reverse the Division's decision regarding the automatic termination of Instapage's license or A&IAD's subsequent dismissal of the grace period request as moot.

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<sup>23</sup> See Reconsideration Petition. We note that Instapage's Reconsideration Petition was timely filed, although filed 31 days after the release of the *Order*. While section 1.106(f) requires that petitions for reconsideration be filed within 30 days from the date of public notice of the final Commission action, section 1.4(j) provides that, if the filing date falls on a holiday (as in this case), the document shall be filed on the next business day. See 47 C.F.R. §§ 1.106(f), 1.4(j).

<sup>24</sup> See Stay Request.

<sup>25</sup> Grace Period Reconsideration Petition.

<sup>26</sup> 47 C.F.R. §§ 1.946(c), 1.955(a)(2).

<sup>27</sup> 47 C.F.R. § 1.946. Section 1.946(e) also states specific circumstances that would not warrant an extension of time to complete construction. 47 C.F.R. § 1.946(e)(2)-(3).

<sup>28</sup> 47 C.F.R. § 1.925. Alternatively, pursuant to section 1.3, the Commission has authority to waive its rules if there is "good cause" to do so. 47 C.F.R. § 1.3. See also *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990).

### A. Instapage Failed to Satisfy the Minimum Coverage Requirement

9. The record indicates that Instapage failed to satisfy the applicable construction benchmark, therefore triggering automatic termination of its license absent grant of a waiver or extension of time. At the time of its construction deadline, Instapage provided service to San Juan, Puerto Rico, constituting only 5,097 square kilometers or 4.2 percent of the population of the Southeast region -- well below the minimum 150,000 square kilometer or 37.5 percent population benchmark required of regional narrowband PCS licensees at that time.<sup>29</sup> Instapage, however, asserts that the Division assessed Instapage's compliance based upon the wrong construction benchmarks.<sup>30</sup> Instapage claims that the Division should have refrained from enforcing the narrowband PCS construction requirements because they were the subject of a pending rule making proceeding.<sup>31</sup> Instapage further asserts that the Commission "should [have] assess[ed] compliance with the Commission's updated rules, and not those that the Commission itself discarded as being outdated and not in the public interest."<sup>32</sup> Instapage claims that it is advocating "the same approach that the Commission has taken with respect to enforcing existing rules in multiple other proceedings where a pending rulemaking proceeding proposed substantial changes to the existing rules."<sup>33</sup> As support for its contention, Instapage cites the decision by the Bureau's Public Safety and Private Wireless Division to suspend the five-year construction benchmark for certain 218-219 MHz service licensees during the pendency of a rule making proceeding to modify 218-219 MHz construction requirements.<sup>34</sup> Instapage also references *Fresno Mobile*, where "the Commission permitted certain groups of licensees to benefit from newly adopted build-out rules."<sup>35</sup>

10. We believe that the Division applied the right benchmark in assessing Instapage's construction compliance. On April 23, 1997, the Commission released a Further Notice of Proposed Rule

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<sup>29</sup> See *Order* at 14031, n. 12. This estimate was calculated using the population and square kilometers of the Basic Trading Area of San Juan, Puerto Rico (BTA488), which is one component of Region 2 (South Region). Instapage argues that it provided "substantial service" pursuant to the amended construction benchmarks. As explained above, Instapage was not subject to the amended construction benchmarks, which were neither adopted nor in effect at the time of Instapage's construction deadline. Accordingly, the provision of "substantial service" was not a coverage option and we do not address whether Instapage provided a satisfactory demonstration of substantial service.

<sup>30</sup> Reconsideration Petition at 4.

<sup>31</sup> *Id.* at 3-4; see Amendment of the Commission's Rules to Establish New Personal Communications Services, Narrowband PCS, GEN Docket No. 90-314, ET Docket No. 92-100, Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Narrowband PCS, PP Docket No. 93-253, *Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 12972 ("Narrowband PCS FNPRM").

<sup>32</sup> Reconsideration Petition at 4.

<sup>33</sup> *Id.* at 4.

<sup>34</sup> *Id.* at 4-5, citing In the Matter of Requests by Interactive Video and Data Service Lottery Winners to Waive the March 28, 1997 Construction Deadline, *Order*, 12 FCC Rcd 3181 (WTB 1997) ("218-219 MHz Order"). We note that, in the 218-219 MHz Order cited by Instapage, the Bureau suspended the three-year (and not the five-year) construction benchmark for 218-219 MHz licensees whose licenses had been issued on March 28, 1994. On March 26, 1999, the Public Safety and Private Wireless Division later suspended the five-year construction benchmark for 218-219 MHz licensees with a five-year construction benchmark deadline ending on March 28, 1999. See In the Matter of Request of Licensees in the 218-219 MHz Service for Waiver of the Five-Year Construction Deadline, *Order*, 14 FCC Rcd 5190 (PSPWD 1999) ("Second 218-219 MHz Order").

<sup>35</sup> See Reconsideration Petition at 8, citing Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93- 144, *Memorandum Opinion and Order on Remand*, 14 FCC Rcd 21679 (1999) ("Fresno Mobile").

Making, proposing amendments to its narrowband PCS rules.<sup>36</sup> Among other proposals, the *Narrowband PCS FNPRM* proposed modifying the original construction and minimum coverage requirements for narrowband PCS spectrum, *i.e.*, the requirements that licensees provide coverage over a minimum amount of geographic area or to a minimum percentage of the population, by allowing licensees to meet a “substantial service” benchmark.<sup>37</sup> On June 3, 1999, while the narrowband PCS rule making proceeding was pending, the Bureau released a public notice specifically reminding incumbent narrowband PCS licensees of their impending five-year construction deadline and notification requirement.<sup>38</sup> The Bureau clarified that, although the Commission had proposed changes to the narrowband PCS construction requirements, these proposals had not been adopted. The Bureau explicitly stated “that licensees are required to comply with the rules in effect today,” and not the proposed rules.<sup>39</sup> The Bureau also warned licensees that “[f]ailure to meet the construction requirements will result in forfeiture of the license and inability to regain it.”<sup>40</sup> On May 18, 2000, nearly four months after Instapage’s construction deadline, the Commission released the *Narrowband PCS Second Report and Order*.<sup>41</sup> In the *Narrowband PCS Second Report and Order*, the Commission maintained its current five- and ten-year construction benchmarks, but amended the existing construction requirements to permit narrowband PCS licensees to provide “substantial service” within ten years as an alternative service benchmark.<sup>42</sup> These revised construction requirements took effect on August 7, 2000.<sup>43</sup>

11. In light of these facts, we disagree with Instapage’s claim that the Division should have applied its revised construction benchmarks. The record of the narrowband PCS rule making proceeding, including the *Construction PN*, plainly shows that incumbent licensees were expected to comply with the construction requirements in effect at the time of their buildout deadlines. Instapage’s buildout deadline was January 23, 2000. The revised construction benchmarks were neither adopted nor in effect at that time. Indeed, the option to provide “substantial service” was not in effect until over six months *after* Instapage’s buildout deadline. Furthermore, contrary to Instapage’s assertion, the Commission did not “discard” any construction requirements in its narrowband PCS rule making proceeding; rather, in the *Narrowband PCS Second Report and Order*, the Commission expressly maintained its construction rules and simply added “substantial service” as an alternative.<sup>44</sup> Indeed, the Commission stated that it “disagree[d] with those who argue that the Commission’s current construction benchmarks should be modified,” explaining that its “five- and ten-year benchmarks provide sufficient time for narrowband PCS licensees to construct their systems.”<sup>45</sup> In fact, the Division applied the same “original” coverage

<sup>36</sup> See *Narrowband PCS FNPRM*.

<sup>37</sup> See *id.* at 12995-12998, paras. 41-47.

<sup>38</sup> “Wireless Telecommunications Bureau Reminds Narrowband Personal Communications Services (PCS) Licensees of Five-Year Construction Benchmark,” *Public Notice*, 14 FCC Rcd 9020 (rel. June 3, 1999) (“*Construction PN*”).

<sup>39</sup> *Construction PN* at 9021.

<sup>40</sup> *Construction PN* at 9020.

<sup>41</sup> See Amendment of the Commission’s Rules to Establish New Personal Communications Services, Narrowband PCS, GEN Docket No. 90-314, ET Docket No. 92-100; Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Narrowband PCS, PP Docket No. 93-253, *Second Report and Order and Second Further Notice of Proposed Rule Making*, 15 FCC Rcd 10456 (2000) (“*Narrowband PCS Second Report and Order*”).

<sup>42</sup> *Narrowband PCS Second Report and Order* at 10469.

<sup>43</sup> See Narrowband Personal Communications Services; Competitive Bidding, 65 Fed. Reg. 35843 (June 6, 2000).

<sup>44</sup> See *Narrowband PCS Second Report and Order*.

<sup>45</sup> *Id.* at 10469, para. 25.

benchmarks to the twelve nationwide and 24 regional licensees with five-year construction deadlines prior to the rule revisions; none of these licensees were permitted to make a showing of substantial service. Accordingly, we reject Instapage's argument that the Division applied a construction benchmark that the Commission determined to be not in the public interest.

12. Additionally, we do not find Instapage's situation to be analogous to that of the 218-219 MHz licensees, where the Public Safety and Private Wireless Division granted relief to certain 218-219 MHz licensees in response to multiple timely requests for waiver of the construction benchmarks. Notably, the licensees sought relief and the Public Safety and Private Wireless Division granted a waiver of the five-year construction benchmark *prior* to the 218-219 MHz licensees' five-year construction deadline.<sup>46</sup> In this case, Instapage failed to seek waiver, suspension, or other relief of the narrowband PCS construction requirements in a timely manner. Moreover, in contrast to the 218-219 MHz proceeding, the Commission did not release an Order suspending the construction benchmarks for incumbent licensees prior to their applicable construction deadlines. On the contrary, in its *Construction PN*, the Bureau plainly advised incumbent narrowband PCS licensees that, notwithstanding the pending rule making proceeding, they would be expected to comply with the existing construction requirements in effect at the time of their construction deadline.

13. *Fresno Mobile* is similarly inapplicable to the present case. In *Fresno Mobile*, the Commission altered the construction requirements for incumbent wide-area licensees in the 800 MHz Specialized Mobile Radio (SMR) service based upon its conclusion that SMR licensees granted extended implementation authority are sufficiently similar to geographic area licensees to warrant similar flexibility with respect to construction requirements. Instapage's Reconsideration Petition fails to invoke the same parity concerns.<sup>47</sup> Instapage was subject to the same construction requirements that were applicable to other, similarly-situated narrowband PCS licensees.

**B. Instapage Does Not Warrant a Waiver of the Filing Deadlines or an Extension of Time Pursuant to Section 1.946(e).**

14. In addition to finding that Instapage failed to satisfy its construction benchmark, as discussed above, the Division denied Instapage's request for waiver of the filing deadlines and confirmed that Instapage's license terminated automatically pursuant to section 1.946(c) of the Commission's rules. The Division explained that Instapage failed to provide an adequate explanation for the untimely filing of its waiver request and, accordingly, failed to provide any basis for granting a waiver. In its Reconsideration Petition, Instapage presents several arguments to support its assertion that the Division's denial of its waiver request should be reversed. First, Instapage provides additional information regarding its failure to request an extension of time, including "[o]versight," "[c]onfusion," and "[b]ad judgment."<sup>48</sup> Second, Instapage asserts that it did not receive proper notice of its construction requirement and, further, that if it had received proper notice, it "might have reacted with a full explanation and a request for an extension."<sup>49</sup> Third, Instapage claims that the Division failed to provide its request for waiver with a

<sup>46</sup> We note that the *218-219 MHz Order*, which suspended the three-year construction benchmark for certain 218-219 MHz licensees, involved facts similar to those discussed above with respect to the *Second 218-219 MHz Order*. The requests for relief were filed in a timely manner, and the Bureau released the *218-219 MHz Order* granting relief prior to the three-year construction deadline.

<sup>47</sup> Instapage acknowledges that *Fresno Mobile* "involv[es] sufficiently different facts to be of only marginal applicability here . . . ." Reconsideration Petition at 8.

<sup>48</sup> See Letter from Suresh Gajwani, President, Instapage Network, Ltd, to William W. Kunze, Chief, Commercial Wireless Division, Wireless Telecommunications Bureau, dated August 6, 2001, attached to Reconsideration Petition as Exhibit B, at 5 ("Gajwani Letter").

<sup>49</sup> Gajwani Letter at 5.

“hard look.”<sup>50</sup> Fourth, Instapage further argues that the Division’s action was discriminatory and “hyper-technical,” in comparison to other instances where requests for waiver of Commission requirements have been granted.<sup>51</sup> Instapage argues that these cases “support grant of waiver as needed,” and that additional public interest factors justify an extension, including the number of subscribers utilizing its service offering.<sup>52</sup> Finally, Instapage claims that the Division acted arbitrarily and capriciously in denying its request for waiver.<sup>53</sup> We are not persuaded by Instapage’s arguments and affirm the Division’s denial of Instapage’s waiver request, as discussed below.

### 1. Instapage Does Not Warrant a Waiver of the Filing Deadlines.

15. We agree with the Division that Instapage failed to provide any basis for granting its waiver request. In the underlying proceeding, Instapage claimed that it warranted a waiver of the timely filing requirements for its construction notification and extension request because it failed to receive proper notification from the Commission of its obligations.<sup>54</sup> Instapage failed to provide any other basis for its inability to file a construction notification as of February 7, 2000 or request an extension on or before its construction deadline of January 23, 2000. Similarly, in its Reconsideration Petition, Instapage repeats this argument, claiming that its failure to receive notice of its obligations resulted in its failure to seek relief from the Commission.<sup>55</sup> In addition, Instapage offers “[c]onfusion,” “[o]versight,” and “[b]ad judgment” as further “reasons” for its failure to seek an extension of time to complete construction.<sup>56</sup> Instapage also claims that it did not realize an extension was an option, and that it was “so sure that [it] would have a real way to meet the requirements that [it] assumed that [the] FCC would be pleased with [its] actions.”<sup>57</sup>

16. We do not believe that Instapage has provided adequate justification for grant of its waiver request. Instapage has failed to explain why the purpose of the construction notification and/or timely extension request requirement would not be served by application to the present case, or that, in light of unique or unusual circumstances, the filing deadlines were inequitable, unduly burdensome, or contrary to the public interest, or that Instapage had no reasonable alternative. As Instapage acknowledged, all it had to do was “submit a simple paper asking for an extension”<sup>58</sup> -- far from a burdensome requirement. Instapage failed to satisfy the criteria for grant of a waiver and, accordingly, we affirm the Division’s denial of Instapage’s waiver request. As explained in greater detail below, Instapage should have been fully aware of the construction deadline and notification requirement applicable to its licenses; in fact, Instapage has essentially admitted that its failure to take timely action was due to its own inattention. It is important that licensees take responsibility for their compliance with the Commission’s rules. Forgiving such minimal diligence as was required in order to achieve compliance here would not be in the public interest.

<sup>50</sup> Reconsideration Petition at 12-14.

<sup>51</sup> *Id.* at 6-11.

<sup>52</sup> *Id.* at 9.

<sup>53</sup> *Id.* at 21-23.

<sup>54</sup> *See Order* at 14030, para. 5.

<sup>55</sup> Reconsideration Petition at 16; Gajwani Letter at 5.

<sup>56</sup> Gajwani Letter at 5.

<sup>57</sup> *Id.* at 5.

<sup>58</sup> *Id.* at 5.



## 2. The Division Provided Instapage with Notice and a Full and Fair Opportunity To Demonstrate Compliance with Commission Requirements.

17. We reject Instapage's contention that it should be granted a waiver because it did not receive proper notification of its buildout requirement.<sup>59</sup> Instapage claims that the Commission, in its *ULS Report and Order*, "promised" licensees personal notice.<sup>60</sup> Instapage claims that the Commission committed to providing a "reminder notice" to licensees with construction performance requirements, as well as a post-deadline reminder to licensees who failed to file a timely notification of construction.<sup>61</sup> Instapage states that the *Construction PN* failed to provide sufficient notice, because "it is not the form of notice that the Commission committed to provide (i.e., direct notice), and to which licensees such as Instapage could reasonably expect to receive."<sup>62</sup> Instapage also states that it should have received notice within a certain timeframe ("approximately 90 days beforehand").<sup>63</sup> Consequently, Instapage argues that enforcement of the construction notification rule "would violate fundamental due process and 'elementary fairness,'" and that cancellation of its license implicates property interests protected by the Due Process Clause of the Fifth Amendment," including "the right to receive fair notice before being deprived of property."<sup>64</sup> Instapage also claims that it failed to seek a request for extension of its construction requirements because it was unaware "that this was an option," but that "if [it] had received any kind of prior notice," it "might have reacted with a full explanation and a request for an extension."<sup>65</sup>

18. We are not persuaded by Instapage's arguments. First, licensees have an obligation to be aware of the Commission's rules, which are set forth in Title 47 of the Code of Federal Regulations and which are published in the Federal Register.<sup>66</sup> Section 0.406 of the Commission's rules instructs those having business before the Commission to familiarize themselves with any applicable regulations.<sup>67</sup> Furthermore, the Commission consistently has held that ignorance of the Commission's rules is not an excuse for noncompliance.<sup>68</sup> The Commission's rules provided Instapage with notice of its construction and notification obligations,<sup>69</sup> as well as the requirements for requesting an extension of time.<sup>70</sup> The

<sup>59</sup> Instapage appears to argue, in certain instances, that it failed to receive proper notice of its "payment obligations." See Reconsideration Petition at 14-15. Because payment considerations are not at issue in this proceeding, we assume that Instapage intended notice of construction, rather than payment, obligations.

<sup>60</sup> *Id.* at 14-15, citing Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Service, *Report and Order*, 13 FCC Rcd 21027 (1998) ("*ULS Report and Order*").

<sup>61</sup> *Id.* at 15.

<sup>62</sup> *Id.* at 18.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 17.

<sup>65</sup> Gajwani Letter at 5.

<sup>66</sup> See *In the Matter of Richard Joslin, Application for Renewal of Amateur Operator's License and Vanity Call Sign W7CXW, Memorandum Opinion and Order*, 15 FCC Rcd 23835, 23837 n. 19 (PSPWD 2000).

<sup>67</sup> 47 C.F.R. § 0.406.

<sup>68</sup> See, e.g., *Supercom, Inc., Memorandum Opinion and Order*, 15 FCC Rcd 4604, 4607 (CWD WTB 2000) (ignorance of the Commission's rules is no excuse for noncompliance); *Empire Broadcasting Corp., Memorandum Opinion and Order*, 25 FCC2d 68, 69 (1970) (mere oversight or failure to be aware of the Commission's requirements will not excuse licensee from its obligation to operate in compliance with the Commission's Rules).

<sup>69</sup> See 47 C.F.R. 24.103 (setting forth the construction requirements for narrowband PCS licensees); 47 C.F.R. § 1.946(d) (setting forth the construction notification requirement).

<sup>70</sup> See 47 C.F.R. § 1.946(e).

Commission's rules also provided Instapage with notice of the consequences for failure to comply with its construction obligations. Section 1.946(c) specifically states that "[i]f a licensee fails . . . to meet its coverage . . . obligations by the expiration of its coverage period, its authorization terminates automatically, without specific Commission action, on the date the construction or coverage period expires."<sup>71</sup> In addition, we note that Instapage's authorization itself, on its face, indicates the term of the license and the applicable construction deadlines.

19. Second, we agree with the Division that Instapage was afforded notice of its construction requirement that was substantively identical to the notice contemplated in the *ULS Report and Order*.<sup>72</sup> Prior to Instapage's construction deadline, the *Construction PN* specifically reminded narrowband PCS licensees of the impending construction deadline and provided detailed information regarding the filing of construction notifications.<sup>73</sup> The *Construction PN* also warned licensees that failure to satisfy this construction obligation would result in forfeiture of the license.<sup>74</sup> After Instapage's construction deadline, Instapage had full opportunity in the underlying waiver proceeding to document its coverage as of its buildout deadline and demonstrate compliance with the Commission's construction requirements. Instapage is mistaken in its reliance on the *ULS Report and Order* for the proposition that it was required to receive personal notice of its construction deadline. The *ULS Report and Order* explicitly states that "even if a licensee does not receive a reminder letter, it remains obligated to meet its construction and coverage benchmarks and cannot cite the lack of notification as an excuse for non-compliance."<sup>75</sup> Furthermore, as explained in the *Order*, the purpose of the construction notification procedures was to prevent inadvertent termination of licenses where the licensee could demonstrate timely satisfaction of the underlying construction requirements but had failed to file a notification with the Commission.<sup>76</sup> This concern is not at issue in this case, where Instapage did, indeed, fail to satisfy its substantive construction obligation.

20. Finally, we find that Instapage was not deprived of due process or of any property interest by virtue of its license termination. The U.S. Court of Appeals for the District of Columbia Circuit has found that "[d]ue process requires that parties receive fair notice before being deprived of property."<sup>77</sup> In determining whether a party has fair notice, the critical inquiry is whether "by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform . . . ."<sup>78</sup> In *Trinity Broadcasting*, the U.S. Court of Appeals for the District of Columbia Circuit also explained that a licensee may not be penalized when the rules in question were unclear, the "agency itself struggles to provide a definitive reading of the regulatory requirements," and the licensee's interpretation of those rules was reasonable.<sup>79</sup> As we explain above, the Commission's regulations in effect at the time of Instapage's buildout deadline clearly set forth the specific construction benchmarks that a narrowband PCS licensee was required to satisfy within five years of its initial license grant date. The rules also set

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<sup>71</sup> 47 C.F.R. § 1.946(c).

<sup>72</sup> *Order* at 14031, para. 5.

<sup>73</sup> *See Construction PN*.

<sup>74</sup> *Id.* at 9020.

<sup>75</sup> *ULS Report and Order* at 21075, para. 104.

<sup>76</sup> *Order* at 14030, para. 5.

<sup>77</sup> *General Electric Co. v. Environmental Protection Agency*, 53 F.3d 1324, 1328 (D.C. Cir. 1995).

<sup>78</sup> *Id.* at 1329; *see also Trinity Broadcasting of Florida, Inc. et al. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000) ("*Trinity Broadcasting*").

<sup>79</sup> *Trinity Broadcasting*, 211 F.3d at 632.

forth the specific requirements for notifying the Commission of construction and for seeking relief from the construction requirements. Further, the *Construction PN* reminded narrowband PCS licensees of their construction deadline and notification requirement, and expressly clarified that licensees were responsible for complying with the construction requirements in effect, rather than the proposed construction benchmarks. Finally, the *ULS Report and Order* warned licensees that they were responsible for compliance with the construction benchmarks, regardless of receipt of any particular notice.<sup>80</sup> In light of these explicit directives in the Commission's rules, the *Construction PN*, and the *ULS Report and Order*, Instapage could have identified, with ascertainable certainty, that it was obligated to satisfy the five-year construction requirement in effect at the time of its buildout deadline and to submit a construction notification or request relief in a timely manner. Moreover, in light of the fact that (1) section 1.946(c) of the Commission's rules states that failure to construct in accordance with coverage obligations will result in automatic termination of the license,<sup>81</sup> and (2) the *Construction PN* specifically reminded narrowband PCS licensees that failure to construct in accordance with the rules would result in forfeiture of the license, we find that Instapage had fair notice of the penalty for failure to construct.<sup>82</sup> The rules in this case were clear; it would not be reasonable to interpret our rules and orders as establishing an exception to termination or as creating an extension of the construction requirements if a reminder notice was not received. We find no evidence that Instapage relied upon such an alternative interpretation. If it did, we find such reliance was not reasonable. Rather than some lack of clarity in the Commission's rules, it was Instapage's failure to exercise reasonable diligence that resulted in the termination of its license. In sum, we find that Instapage received fair notice of its obligations and that automatic termination of Instapage's license did not deprive Instapage of its due process rights.

### 3. The Division Gave Instapage's Request for Waiver a "Hard Look"

21. Instapage claims that it "set forth multiple legitimate bases for the waiver that it requested," and that its request failed to receive the "hard look" as set forth in *WAIT Radio v. FCC*.<sup>83</sup> Instapage claims that the Division failed to adequately consider the following arguments in support of its waiver request: (1) the Commission had "determined that the public interest would not be served by retaining the [construction] rule at issue"; (2) "Instapage demonstrated that it had done more than most narrowband licensees with respect to construction"; and (3) Instapage failed to receive notice of its impending construction deadline.<sup>84</sup> Instapage also claims, as additional support for its waiver request, that it "reminded the Commission that it had already paid to the FCC over \$2 million" and "was current on all payment obligations."<sup>85</sup>

22. Under the "hard look" standard, an agency is required "to articulate with clarity and precision its findings and the reasons for its decisions."<sup>86</sup> We find that the Division provided a reasoned

<sup>80</sup> *ULS Report and Order* at 21075, para. 104.

<sup>81</sup> 47 C.F.R. § 1.946(c).

<sup>82</sup> *Cf. Lakeshore Broadcasting, Inc. v. FCC*, 199 F.3d 468, 474-476 (D.C. Cir. 1999) (finding that dismissal of an application for a construction permit for failure to make timely payment on a hearing fee was not a violation of due process for lack of notice because an applicant before the Commission "knew or should have known that its application was subject to dismissal if it failed to abide by the Commission's various regulations," and that if the applicant had "simply read the Commission's regulations, it would have known how to determine and satisfy the deadline for paying its hearing fee").

<sup>83</sup> Reconsideration Petition at 12-14; *see WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972).

<sup>84</sup> Reconsideration Petition at 13.

<sup>85</sup> *Id.* at 13.

<sup>86</sup> *Wait Radio v. FCC*, 418 F.2d at 1156.

explanation for its denial of Instapage's waiver request with respect to filing deadlines in the *Order*. The Division explained, and we agree, that Instapage's request for waiver was deficient in numerous respects. Instapage failed to comply with the substantive construction requirements in effect at the time of its buildout deadline. Indeed, the record shows that Instapage did not come close to complying with these requirements by its buildout deadline. Furthermore, Instapage filed its construction notification over four months late and filed its waiver request five months late. Instapage failed to provide any explanation for its inability to file either its notification or its request for relief in a timely manner, other than to allege insufficient notice of its construction deadline. As explained above, Instapage received adequate notice of its obligations and was obligated to comply with Commission regulations. Finally, we do not believe that the additional rationales raised in the Reconsideration Petition (such as oversight, confusion, and lack of awareness that an extension was an option) constitute compelling bases for waiver. As explained above, licensees are responsible for being aware of Commission regulations and may not cite ignorance of the Commission's regulations as an excuse for noncompliance. Accordingly, we affirm the Division's determination that Instapage failed to satisfy the requirements for a waiver of the filing deadlines.

#### 4. The Division's Action Was Not Discriminatory.

23. Instapage argues that denial of its request for waiver was discriminatory based upon previous instances where licensees were granted waivers of Commission rules. Specifically, Instapage cites *Self Communications*,<sup>87</sup> *Fresno Mobile*, and *Benbow PCS Ventures/Page Call, Inc.*<sup>88</sup> as comparable cases where the Commission granted waivers of its requirements. We disagree. In each of these cases, the petitioners demonstrated unique circumstances supporting waiver of the Commission's rules. We find the facts of these cases to be dissimilar from the facts of this proceeding. In *Self Communications*, the Public Safety and Private Wireless Division granted a request for waiver of the Commission's rules establishing license renewal terms and reinstated *Self Communications*' license.<sup>89</sup> Although the petitioner did not file a timely renewal application, it claimed that it had failed to do so "because it believed that it was not required to file a renewal application . . . given that the Commission had adopted a proposal . . . to change the license term."<sup>90</sup> In this case, Instapage cannot reasonably claim that it was unaware of the applicable construction requirement. As explained above, the Commission's regulations clearly set forth the construction benchmarks for regional narrowband PCS licensees, and the face of Instapage's authorization indicated the construction deadlines. Furthermore, the Bureau's public notice expressly clarified that any proposed modifications to the narrowband PCS construction requirements had not been adopted and that licensees were expected to comply with the construction requirements in effect at the time of their applicable deadline. Finally, in *Self Communications*, the decision to reinstate the license was based upon the totality of the circumstances, including that *Self Communications* had expressed its desire to retain the license prior to the license's scheduled expiration date and had made efforts to construct the station.<sup>91</sup> We note that in *Self Communications*, the Public Safety and Private Wireless

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<sup>87</sup> *Self Communications, Inc., Reinstatement Application for 218-219 MHz Service License KIVD0006, Chicago, Illinois and Request for Waiver of Sections 1.949(a) and 1.955(a)(1) of the Commission's Rules, Order and Notice of Apparent Liability for Forfeiture*, 15 FCC Rcd 18661 (PSPWD 2000) ("*Self Communications*").

<sup>88</sup> See Letter from William W. Kunze, Deputy Chief, Commercial Wireless Division, Wireless Telecommunications Bureau, to Kathryn A. Zachem, Esq., dated January 21, 2000, File No. 0000072588; Letter from William W. Kunze, Deputy Chief, Commercial Wireless Division, Wireless Telecommunications Bureau, to Kathryn A. Zachem, Esq., dated January 21, 2000, associated with File No. 0000072588 ("*Benbow PCS Ventures/Page Call, Inc.*").

<sup>89</sup> *Self Communications* at 18661, 18665, paras. 1, 11.

<sup>90</sup> See *id.* at 18662, para. 5.

<sup>91</sup> *Id.* at 18663-64, para. 7. A Notice of Apparent Liability was issued against *Self Communications* for willfully violating the Commission's rules. *Id.*

Division explicitly disclaimed, as a basis for granting a waiver, the petitioner's argument that it had failed to file a timely renewal application because it failed to receive a renewal notice.<sup>92</sup>

24. *Fresno Mobile* and *Benbow PCS Ventures/Page Call, Inc.* similarly are inapplicable to the present case. As discussed above, *Fresno Mobile* invoked parity concerns that are not at issue here. In *Benbow PCS Ventures/Page Call, Inc.*, the Division extended the five year construction deadline for the five narrowband PCS licenses at issue, finding that "it would be premature to allow the licenses to cancel during the Commission's consideration" of the proposal submitted by Benbow PCS Ventures, Inc. and Page Call, Inc. (collectively, "Benbow") for debt forgiveness, pursuant to which the licenses would be surrendered "to the Commission in exchange for forgiveness of the remaining installment debt owed on the licenses."<sup>93</sup> The requests for extension of time were submitted in a timely manner. Instapage requests similar treatment to *Benbow PCS Ventures/Page Call, Inc.*, referencing Instapage's pending request for a remedial bidding credit.<sup>94</sup> We do not find Instapage's request for a remedial bidding credit to be analogous to the circumstances in *Benbow PCS Ventures/Page Call, Inc.* Should Benbow's proposal for debt forgiveness be granted, Benbow would no longer hold licenses and therefore would not be subject to construction requirements. In contrast, Instapage remains subject to the applicable construction benchmarks, regardless of whether its request for remedial bidding credits is granted.<sup>95</sup> Furthermore, unlike in *Benbow PCS Ventures/Page Call, Inc.*, Instapage failed to request timely relief from its construction requirements. Finally, we note that *Benbow PCS Ventures/Page Call, Inc.* did not involve licenses that already had terminated automatically months prior to any request for relief.

#### **5. The Division's Refusal to Grant Instapage's Request for Relief is Not Arbitrary and Capricious.**

25. Instapage claims that the Division "singled out" section 24.103 for "unyielding," arbitrary, and capricious enforcement, in light of other instances in which either construction or payment requirements have been waived.<sup>96</sup> By way of example, Instapage references circumstances in which payment obligations have been waived, including upfront payments, post-auction down payment obligations, and overbids.<sup>97</sup> Instapage also claims that it has done more than other narrowband PCS licensees and "[t]he vast majority of both regional and nationwide licensees have not operated genuine commercial systems that comply with the Commission's minimum buildout requirements."<sup>98</sup>

26. We find that the Division did not act in an arbitrary and capricious manner in denying Instapage's request for relief. Narrowband licensees were clearly informed of the benchmark by which their construction notifications would be assessed. As explained earlier, the *Construction PN* reminded licensees of their construction and notification obligations and clarified that licensees must comply with

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<sup>92</sup> *Id.* at 18663, para. 6.

<sup>93</sup> *See Benbow PCS Ventures/Page Call, Inc.*

<sup>94</sup> Reconsideration Petition at 10, n. 16; *see also* Informal Request for Remedial Bidding Credit filed by Thomas Gutierrez, counsel for counsel for Instapage Network Ltd, on November 12, 1999.

<sup>95</sup> We note that, subsequent to the filing of Instapage's Reconsideration Petition, the Bureau dismissed, with prejudice, Instapage's request for remedial bidding credits. *See* Letter from Kathleen O'Brien Ham, Deputy Chief, Wireless Telecommunications Bureau, to Thomas Gutierrez, Esq., Counsel for Instapage Network Ltd, DA 02-1574, dated July 8, 2002. The Bureau held that Instapage's request was untimely under the Commission's rules, as well as barred by the doctrine of waiver.

<sup>96</sup> Reconsideration Petition at 21.

<sup>97</sup> *Id.* at 22, Exhibit D (entitled "Payment Waiver Decisions").

<sup>98</sup> *Id.* at 11.

the construction requirements in effect at the time of their buildout deadline. Furthermore, grant of waivers in other contexts, such as for lack of timely payment or payment obligations for overbids, does not necessarily provide a basis for grant of a waiver of the construction filing deadlines.<sup>99</sup> Under the Commission's standards for granting a waiver of its rules, the Commission may grant a waiver if it determines that the underlying purpose of a rule would not be served by its application in a given case.<sup>100</sup> Thus, the Commission must evaluate waiver requests in light of the specific provisions and underlying purposes of the rule for which a waiver is sought. The bid withdrawal payment, upfront payment, and down payment rules are intrinsically different in scope and purpose from the construction rules. While Instapage is correct that the Division has waived construction requirements in certain cases, these determinations have been made on a case-by-case basis and have been based upon the totality of the circumstances of each case. As Instapage admits, the Division has also denied requests for waiver of the construction deadlines in instances in which licensees have failed to file timely requests for relief.<sup>101</sup>

27. Furthermore, we are not persuaded that Instapage warrants relief based upon its claim that other narrowband PCS licensees are not complying with Commission regulations. We do not have evidence that these licensees are failing to comply with Commission regulations, nor does Instapage provide any documentation to support its claim that the "vast majority" of narrowband PCS licensees have not operated systems that are in compliance with Commission buildout regulations.

### C. Reinstatement of Instapage's License is not Warranted.

28. We reject Instapage's argument that, even if we affirm the Division's decision that Instapage's license terminated automatically, we should reinstate Instapage's license.<sup>102</sup> As support for its reinstatement claim, Instapage references its level of construction.<sup>103</sup> Instapage further claims that reinstatement would serve the public interest because, absent such an action, there would be a delay in deployment of services due to the time necessary for the license to be auctioned and for the new licensee to build out its system.<sup>104</sup>

29. First, we are not persuaded that Instapage's license should be reinstated because of Instapage's level of construction. While we recognize that Instapage has taken steps toward constructing its narrowband PCS system, the level of construction at the time of Instapage's buildout deadline does not demonstrate the level of diligence expected of a licensee in meeting the construction requirements for its license. Of Instapage's licensed area, which consisted of ten Major Trading Areas, Puerto Rico, and the United States Virgin Islands,<sup>105</sup> Instapage provided coverage only to San Juan, Puerto Rico as of its construction deadline. Instapage therefore provided service to, at most, approximately 5,097 square kilometers or just 4.2 percent of the population of the Southeast region. Far from being "considerable,"

<sup>99</sup> Cf. In the Matter of Southern Communications Systems, Inc., Request for Limited Rule Waiver to Comply with PCS Installment Payment for C Block Licenses in the Cleveland, TN BTA, *Memorandum Opinion and Order*, 15 FCC Rcd 25103, 25110 (2000).

<sup>100</sup> See 47 C.F.R. § 1.925.

<sup>101</sup> See Reconsideration Petition at 9-10, n. 15, citing Request of County of Alamance, North Carolina, Request for Extension of Construction Deadline for 220 MHz Non-Commercial, Non-Nationwide Station WPCC439, *Order*, 13 FCC Rcd 23335 (PSPWD, 1998); David J. Teat, Request for Extension of Construction Deadline for 220 MHz Non-Nationwide License WPFM981, Knoxville, Tennessee, *Order*, 15 FCC Rcd 689 (CWD, WTB 2000). Instapage claims, however, that these cases are "inapplicable to Instapage's request." *Id.* at 10, n. 15.

<sup>102</sup> *Id.* at 19-21.

<sup>103</sup> *Id.* at 20.

<sup>104</sup> *Id.* at 20-21.

<sup>105</sup> See 47 C.F.R. § 24.102(b)(2).

Instapage's level of construction fell well below the minimum 150,000 square kilometer or 37.5 percent population benchmark. The Commission's construction requirements are meant to "encourage the provision of service to areas that would not necessarily receive service expeditiously solely through the operation of market forces."<sup>106</sup> By deploying its network only in San Juan, Instapage chose to provide service to only a small portion of its licensed area and failed to meet its minimum coverage benchmark, thereby undermining the goals of the Commission's construction requirements. Accordingly, we do not find that Instapage's construction activity justifies reinstatement of its license.

30. Second, we are not persuaded by Instapage's argument that reinstatement serves the public interest because, absent reinstatement, the public will be deprived of the use of the spectrum for several years.<sup>107</sup> Although subscribers may not be able to find a service that is identical to the voice paging service offered by Instapage, our research indicates that subscribers may select among similar service offerings, including traditional numeric and text paging, messaging services with voicemail access, and digital services that include voice, messaging, and voicemail capability. Indeed, there are multiple, competing mobile telephony service providers in Instapage's licensed areas. Furthermore, we reject the argument that Instapage may provide service more quickly than if the spectrum were re-auctioned and the construction period re-set for a new licensee, because *any* licensee failing to meet its buildout obligation but asking for a buildout extension not longer than the amount of time a new licensee would be given to construct could make the same argument. Accordingly, we find that grant of reinstatement on this basis alone would effectively undermine the construction rules adopted by the Commission.<sup>108</sup>

#### **D. Instapage's Stay Request is Moot.**

31. We note that Instapage requested a stay of certain STA conditions pending consideration of its Reconsideration Petition. Instapage argued that there was a substantial likelihood that its Reconsideration Petition would succeed on the merits and that enforcement of certain STA conditions would substantially impair Instapage's ability to continue operations.<sup>109</sup> Because we deny Instapage's Reconsideration Petition, and because the STA expired on January 16, 2002 and Instapage did not seek to renew the STA, we dismiss Instapage's Stay Request as moot.

#### **E. Instapage's Grace Period Request Remains Moot**

32. Instapage's challenge to A&IAD's *Grace Period Dismissal Order* substantively relies upon its challenge to the automatic termination of its licenses.<sup>110</sup> In its filing, Instapage argues that if the automatic termination of its license is reversed, A&IAD's determination that the grace period request was moot should be similarly reversed because it was premised upon the conclusion that Instapage's license had automatically terminated.<sup>111</sup> In light of our decision with respect to the automatic termination issue, Instapage's grace period request remains moot. Accordingly, we deny the petition for reconsideration of A&IAD's *Grace Period Dismissal Order* for the same reasons we deny the August 20, 2001 Petition for Reconsideration.

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<sup>106</sup> *Narrowband PCS Second Report and Order* at 10469, para. 24.

<sup>107</sup> Reconsideration Petition at 20.

<sup>108</sup> *Cf.* In the Matter of Polycell Communications, Inc., Request for Waiver and Extension of the Broadband PCS Construction Requirements, *Order*, 17 FCC Rcd 11909, 11911 (CWD, WTB 2002).

<sup>109</sup> *See* Stay Request at 4-7.

<sup>110</sup> Grace Period Reconsideration Petition.

<sup>111</sup> *Id.*

#### IV. CONCLUSION

33. We agree with the Division that Instapage failed to satisfy its substantive construction requirement and, further, that Instapage failed to warrant a waiver of the applicable filing deadlines. Accordingly, Instapage's license terminated automatically on January 23, 2000. In light of the foregoing, we affirm the *Order* and deny Instapage's Reconsideration Petition.

#### V. ORDERING CLAUSE

34. Accordingly, IT IS ORDERED that, pursuant to authority delegated by Section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and Sections 0.331 and 1.106 of the Commission's rules, 47 C.F.R. §§ 0.331, 1.106, the Petition for Reconsideration filed by Instapage Network, Ltd. on August 20, 2001 is hereby DENIED.

35. IT IS FURTHER ORDERED that, pursuant to sections 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), and sections 0.331 and 1.43 of the Commission's rules, 47 C.F.R. §§ 0.331, 1.43, the Request for Partial Stay filed by Instapage Network, Ltd. on August 15, 2001, is DISMISSED as moot.

36. IT IS FURTHER ORDERED that, pursuant to Section 4(i) 47 U.S.C. § 154(i), and Sections 0.331 and 1.106 of the Commission's rules, 47 C.F.R. §§ 0.331, 1.106, the Petition for Reconsideration filed by Instapage Network, Ltd. on August 27, 2001 is hereby DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas J. Sugrue  
Chief, Wireless Telecommunications Bureau